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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LAKISHA YOUNG, Defendant and Appellant.	A150761 (Alameda County Super. Ct. No. 176745)

Defendant Lakisha Young shot and killed Jeron Smith in East Oakland in front of several witnesses, and a residential security camera recorded the killing. Young's primary defense was that she shot Smith in self-defense after they argued and he threatened to get a gun. A jury determined otherwise, convicting her of one count of second degree murder and finding true three firearm-related enhancement allegations, including that she personally and intentionally discharged a firearm causing death. The trial court sentenced her to 40 years to life in prison.

On appeal, Young contends that the murder conviction must be reversed because the trial court improperly (1) admitted into evidence statements she gave to the police without validly waiving her rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) admitted into evidence out-of-court statements made by an uncooperative prosecution witness; (3) failed to give a unanimity instruction; (4) defined implied malice to the jury; and (5) failed to instruct on involuntary manslaughter as a lesser included offense of murder. She also contends that the cumulative effect of these errors requires reversal. We reject these claims and affirm, except we agree with the parties that a

remand is necessary in light of Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620) for the trial court to consider whether to strike the firearm enhancements.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. The Murder of Jeron Smith.

At the time of his death in October 2014, Smith, whose nickname was Freeway, had known Young for several years. Their mutual friend, Mikel Newell, was murdered in May 2013. Smith, who was present when Newell was killed, had a tattoo on his arm that said "RIP Kel." According to Young, who testified in her own defense, Smith and Newell had robbed some people, who then chased them and shot Newell. After Newell's death, Young stopped hanging out with Smith because she was afraid that he was still a target, and she believed that he knew who the killers were. She described Smith as paranoid that people "thought he had something to do with" Newell's death.

In the early hours of October 4, 2014, several people, including Smith and Young, were gathered in front of an apartment complex on 72nd Avenue in Oakland. T.S., who had lived on 72nd Avenue for several years, was sitting in her car in the complex's parking lot because it was hot that night.[1] According to T.S., Young and others had been on 72nd Avenue all day, "snorting powder" and "partying." T.S. knew Young as a lesbian named Keesha "from Greenside" and identified her in a booking photograph.[2]

Suddenly, T.S. heard "boom, boom," and when she looked over, she saw Smith, whom she did not know, and Young. T.S. heard Young say, " 'Yeah Freeway you bitch ass nigga,' " and there were more booming noises. Smith, who had been running,

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[1] The account of what T.S. witnessed is drawn from the video recording of her interview with Oakland police shortly after Smith's murder, portions of which were played for the jury. As discussed further below in part II.B., at trial T.S. claimed not to remember witnessing a murder or speaking to the police about it.

[2] Young acknowledged that she saw T.S., who was the mother of one of her girlfriends, sitting near a car and drinking that night. Young testified that she did not get along with T.S. because T.S. "didn't like the fact that her daughter was dating women."

"stopped and turned around" and put up his hands, saying something like, " 'Keesh, Keesh. Come on now, please stop.' Boom, boom and he just dropped." T.S. told the police that Smith had not appeared to be armed.

B. The Aftermath.

A neighbor who heard the gunshots called 911. Oakland police officers arrived on the scene to find Smith lying unresponsive on the sidewalk in front of the apartment complex. There was a cell phone on top of his body. Sixteen nine-millimeter cartridge cases and some bullet fragments were collected at the scene. No firearms were located, however, and the murder weapon was never recovered.

Smith died of multiple gunshot wounds. He had been shot at least three times: once in his chest, with the bullet passing through his body; once in his right leg above his ankle, with the bullet staying in his leg; and once on the inside of his right foot near his big toe, with the bullet fragmenting in his foot. The bullet that caused the most damage entered the left side of his chest at a slight downward angle, passed through his left lung, severed his spinal cord, and exited the right side of his chest. In addition, there were two graze wounds near the exit wound on Smith's chest, which could have been caused by one or two additional shots. The forensic pathologist who performed Smith's autopsy was unable to determine the order in which the gunshot wounds occurred or what position Smith was in when he was shot.

Another resident of 72nd Avenue had a surveillance camera set up facing the street, toward the apartment complex. The police obtained a recording from the camera that depicted the murder. In the recording, which was admitted into evidence, Smith could be seen going to his car at least twice and possibly three times. Smith could also be heard saying something like " 'Come on, Keesh.' " The recording did not, however, confirm T.S.'s claim that Smith had his hands up.

Within hours of the shooting, Young was arrested at her mother's home. Although she initially denied to the police that she had been on 72nd Avenue when Smith was shot, she quickly admitted that she had in fact been there and confessed to shooting

him. Her account to the police was generally consistent with her testimony at trial, which is summarized below.

C. Young's Testimony About the Murder.[3]

Young testified that on the afternoon of October 3, she took a Xanax pill after not sleeping all night because she was on cocaine. After "pass[ing] out," she woke up around 4:00 p.m. and went to get a haircut. She then made her way to 72nd Avenue, near where two of her girlfriends lived, to hang out and celebrate her upcoming 29th birthday. She used cocaine and drank alcohol, which she testified made her feel "[c]alm, collected. Just chilling, enjoying [her] time." Young, who was about five feet tall and around 100 pounds, had a gun with her that night, which she claimed she obtained from a friend for protection.

Much later that night, Young saw Smith arrive on 72nd Avenue, and he passed by her as he headed toward an area where they normally bought drugs. When he returned, he put his arm around Young's neck and "forced [her] to go the opposite way [from where she] was standing" as he repeatedly said, " 'What's up? What's up?' " Smith seemed high on drugs in a different way than usual, and Young "didn't know what was wrong with him."[4]

Smith then released Young and said, " 'You don't fuck with me no more, huh?' " Young, who understood him to be referring to the tension over Newell's death, responded, " 'No, nothing like that.' " Smith insisted that she thought he had something to do with Newell's murder, and she responded, " 'No. I know who y'all robbed.' " Smith said, " 'What you mean? If somebody gave me a gun, I would have handled that.' " Young, who perceived him to now be "talking at [her] instead of with [her]," responded, " 'So that mean you know who did it.' " Smith said, " 'Man. Man. That's

[3] Young also testified at length about her struggles in life, including a childhood spent in the dependency system. We do not detail this testimony because it does not affect our resolution of the appeal.

[4] Smith had morphine and methamphetamine in his system at the time he died.

the shit I'm talking about. Like y'all think I have got something to do with it.' " Young said, " 'I never said that. Somebody was trying to kill you, too, right?' "

Young started walking away, and Smith grabbed her arms. She tried to push him away, but he was too strong. Although she was afraid, she was determined to "hold [her] ground[]" and said, " 'You want some bitch ass shit?' " Smith backed off and began moving toward his car as they exchanged more words. Within seconds, Smith returned from his car and said, " 'You think you are the only one with a gun? You think you are?' " Young was puzzled because she did not think Smith had seen she had a gun, and she felt threatened. He usually had a gun whenever she encountered him, and she had seen him fire a gun several months earlier during a dispute over a drug deal.

Smith went to his car a second time, returned again, and "said the same things, but like he was more demanding, like being more aggressive." After telling Young that she was not the only one with a gun, Smith "kept on nodding . . . his head and smil[ing]." Young perceived him to be "basically threatening [her]," and, when he then went back to his car for a third time, she believed he was going to get a gun and "[h]urt" her.

Smith continued to nod his head at Young, reached his car, and opened the door. To prevent him from reaching the gun she thought he had, Young took out her own gun and fired it at him three times. Although she admitted that the surveillance recording showed her shoot several more times, she testified that could not remember anything else after the first three shots except "hearing [her] name, and when [she] heard [her] name, [she stopped] shooting." She then remembered running to her aunt's house nearby, dropping the gun on the way, and eventually making her way to her mother's house. She claimed that she did not realize she had killed Smith until after she was arrested.

D. The Verdict and Sentencing.

Young was charged with one count of murder and one count of unlawful firearm activity, both felonies.[5] In connection with the murder count, she was alleged to have

[5] The charges were brought under Penal Code sections 187, subdivision (a) (murder) and 29805 (unlawful firearm activity). All further statutory references are to the Penal Code unless otherwise noted.

personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing death, as well as to have personally inflicted great bodily injury.[6] Young pleaded no contest to the count of unlawful firearm activity, and she was tried only on the murder count.

The jury acquitted Young of first degree murder but found her guilty of second degree murder and found true all the accompanying enhancement allegations. The trial court struck the great-bodily-injury enhancement, which does not apply to murder (§ 12022.7, subd. (g)), and sentenced her to a total term of 40 years to life in prison. The sentence was composed of a term of 15 years to life for the murder, a consecutive term of 25 years to life for the personal and intentional discharge of a firearm causing death, and a concurrent term of eight months for the unlawful firearm activity. Twenty- and ten-year terms for the other two firearm enhancements were imposed and stayed.

II.
DISCUSSION

A. The Trial Court Properly Denied Young's Motion to Suppress Her Statements to the Police.

Young first claims that the trial court erred by denying her motion to suppress her statements to the police because she did not validly waive her *Miranda* rights before the interview began. We are not persuaded.

1. Additional facts.

At Young's request, the trial court held a hearing to determine whether the police obtained her statements in violation of *Miranda*. At the hearing, an Oakland police sergeant testified that he participated in an interview of Young after her arrest. The sergeant described the circumstances of the interview, including its length, the giving of the *Miranda* warnings, and Young's demeanor. The interrogation was recorded, and the

[6] The allegations were made under sections 12022.7 (great bodily injury) and 12022.53, subdivisions (b) (personal use), (c) (personal and intentional discharge), and (d) (personal and intentional discharge causing death).

recording, a transcript of it, and a *Miranda* form initialed by Young were admitted into evidence.

As relevant here, the sergeant read the *Miranda* admonishment and, after finishing it, asked Young, "Do you understand your rights?" She responded, "Yeah. But what did I get arrested for?" The sergeant sought to confirm, asking, "So you understood your rights? You said yes?" Young responded, "Yeah. I got a warrant."

After some discussion suggesting Young believed she had been arrested for violating her probation in a domestic-violence case, the sergeant told her they were "in here to talk about somethin[g] else," which he described as "a little incident that just happened the other night" on 72nd Avenue. The police then proceeded to interrogate Young about Smith's murder, which she eventually admitted to committing.

Young argued below that she did not voluntarily waive her *Miranda* rights because she had believed she was being questioned about her probation in an unrelated case and did not "appreciate that she was about to be questioned about a homicide." The trial court ruled that there had been no *Miranda* violation. It explained that before the interview began Young "had rested quite a bit [and] . . . didn't appear [to be] under the influence of anything or [have had] . . . any stressors placed upon [her] other than . . . [being] in custody," was an adult who did not appear to have any "medical impediments," and had not hesitated to speak with the officers after being admonished. Thus, the court concluded that under "the totality of the circumstances," Young had been "properly Mirandized." In doing so, the court rejected her claim that the waiver was invalid because she did not understand which offense was at issue, observing that "[t]he state of the law is that officers do not necessarily have to indicate that the [*Miranda* admonishment] pertains to any particular conduct."[7]

[7] In making its ruling, the trial court did not rely on Young's *Miranda* form, which is not in the record before us. We will therefore assume that the form did not establish a valid waiver.

2. Discussion.

Miranda held that to protect the federal constitutional right against self-incrimination, "any person who is suspected or accused of a crime and who has been taken into custody or otherwise restrained may not be interrogated by the police unless he [or she] first knowingly and intelligently waives his [or her] right to silence, to the presence of an attorney, and to appointed counsel if indigent. Statements obtained in violation of *Miranda* are not admissible to prove the accused's guilt in a criminal prosecution." (*People v. Ray* (1996) 13 Cal.4th 313, 336.) Since Young's claim involves no disputed facts, we " 'independently decide whether the challenged statements were obtained in violation of *Miranda*.' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1269 (*Gonzales*).)

" 'No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. [Citations.] In determining the validity of a *Miranda* waiver, courts look to whether it was free from coercion or deception, and whether it was " 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " ' " (*Gonzales*, *supra*, 54 Cal.4th at p. 1269.) Although *Miranda* spoke of the prosecution's " 'heavy burden' to show waiver, . . . this 'heavy burden' is not more than the burden to establish waiver by a preponderance of the evidence." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 383-384 (*Berghuis*).) The ultimate question is "whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation" (*People v. Cruz* (2008) 44 Cal.4th 636, 668), " ' "keeping in mind the particular background, experience[,] and conduct of the accused." ' " (*Gonzales*, at p. 1269.)

We agree with the parties that Young did not expressly waive her *Miranda* rights before questioning began, and we therefore consider whether there was an implied waiver. To establish a valid implied waiver, it is sufficient for the prosecution to show that (1) a *Miranda* admonishment was given; (2) the defendant understood these rights; and (3) the defendant then made an uncoerced statement. (*Berghuis*, *supra*, 560 U.S. at p. 384.) Thus, "[i]n general, if a custodial suspect, having heard and understood a full

explanation of his or her *Miranda* rights, then makes an uncompelled and uncoerced decision to talk, he or she has thereby knowingly, voluntarily, and intelligently waived them." (*People v. Cunningham* (2015) 61 Cal.4th 609, 642, see also *Gonzales*, *supra*, 54 Cal.4th at p. 1269.) Young concedes that "she was properly read her *Miranda* rights before she was questioned" and does not claim that her participation in the interview was coerced, so the only issue we must address is whether she understood her rights.

Although Young acknowledges that she verbally agreed that she understood her *Miranda* rights, she complains that the sergeant "did nothing to ensure that [she] actually understood the rights or their meaning." She points out that in *Berghuis*, the police gave the following warning in addition to those required under *Miranda*: " 'You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.' " (*Berghuis*, *supra*, 560 U.S. at p. 375.) In addition, she cites *People v. Whitson* (1998) 17 Cal.4th 229, in which a police officer told the defendant, " 'You understand you don't have to talk to me if you don't want to.' " (*Id.* at p. 250.) Although *Berghuis* and *Whitson* cited these additional statements by police in determining that the respective defendants understood their rights, neither decision suggested that such language was *required*. (See *Berghuis*, at pp. 385-386; *Whitson*, at p. 250.) And Young provides no authority at all for her suggestion that the police should have explained more fully the right to counsel, including that appointed counsel would be free of charge or that her communications with counsel would be privileged. She therefore fails to demonstrate that any additional explanation was legally required.

Young also suggests that she did not fully understand the consequences of waiving her rights, as "the interview began with discussions about [her] probation violation" and "there is no evidence she understood that if she talked she could be tried and convicted of murder and sentenced to life in prison." But " '[a] valid waiver does not require that an individual be informed of all information "useful" in making his [or her] decision or all information that "might . . . affect[t] his [or her] decision to confess." [Citation.] "[W]e have never read the Constitution to require that the police supply a suspect with a flow of

information to help him [or her] calibrate his [or her] self-interest in deciding whether to speak or stand by his [or her] rights." ' " (*People v. Tate* (2010) 49 Cal.4th 635, 683, quoting *Colorado v. Spring* (1987) 479 U.S. 564, 576-577.) Moreover, the police made clear to Young *before* she made any incriminating statements that they intended to question her about Smith's murder, and she "could not have reasonably believed" that the *Miranda* rights applied to her other case but not a murder charge. (*People v. Duren* (1973) 9 Cal.3d 218, 242.) In short, we conclude that the record demonstrates a valid implied waiver of *Miranda* rights, and the trial court's ruling was therefore correct.

B. The Admission of T.S.'s Statements to the Police Did Not Violate the Confrontation Clause.

Young contends that the trial court's admission of T.S.'s out-of-court statements under Evidence Code section 1235 (section 1235), which establishes an exception to the hearsay rule for inconsistent statements by witnesses, violated her federal right to confrontation for two reasons. First, Young argues that the ruling was inconsistent with *California v. Green* (1970) 399 U.S. 149 (*Green I*), which addressed the constitutionality of section 1235. Second, she claims that the statements were inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), because T.S. was not "unavailable" as a witness. We are not persuaded on either count.

1. Additional facts.

The prosecution called T.S. as a witness at trial. From the beginning of her testimony, she refused to provide forthcoming answers to even basic background questions, such as where she grew up and whether she was living on 72nd Avenue at the time of Smith's murder. She denied knowing Young, and she consistently answered that she could not remember when asked questions about the crime, including when asked whether she had ever seen anyone killed. When the prosecutor played excerpts of her interview with the police, she repeatedly testified that she did not remember making the statements.

On cross-examination, Young's trial counsel asked T.S. about a dozen questions in order to suggest her statements to the police were unreliable, including whether she was a

police informant, whether she had been drinking the night of the murder, and whether she disliked Young because she dated T.S.'s daughter. T.S. answered that she did not remember in response to each of defense counsel's questions. She was then excused subject to recall.

Young sought to exclude T.S.'s out-of-court statements as inadmissible hearsay, arguing that the statements did not qualify as prior inconsistent statements because T.S. had testified only that she could not remember making them. The trial court denied Young's request, finding that T.S. had been "deliberately evasive" such that her previous statements could be treated as inconsistent. In doing so, it noted that T.S. was subject to recall and there was still "an opportunity to revisit some areas that [the parties] may feel were not fleshed out." Neither party ultimately recalled T.S. to testify.

2. Discussion.

"The Confrontation Clause of the Sixth Amendment gives the accused the right 'to be confronted with the witnesses against him [or her],' " which includes the right to "an adequate opportunity to cross-examine adverse witnesses." (*United States v. Owens* (1988) 484 U.S. 554, 557.) "This confrontation right seeks 'to ensure that the defendant is able to conduct a "personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him [or her] to stand face to face with the [jurors] in order that they may look at him [or her], and judge by his [or her] demeanor upon the stand and the manner in which he [or she] gives his [or her] testimony whether he [or she] is worthy of belief." ' " (*People v. Cromer* (2001) 24 Cal.4th 889, 896-897.) We review Young's confrontation clause claims de novo. (See *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

" 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' " (*People v. Sapp* (2003) 31 Cal.4th 240, 296.) Section 1235 provides, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with

his [or her] testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." Evidence Code section 770, in turn, provides that extrinsic evidence of a witness's inconsistent statement normally is admissible only if the witness has an opportunity to address the statement.

Young argues that even though *Green I* held that section 1235 is constitutional "on its face," the admission of T.S.'s statements violated the confrontation clause because "the essential elements creating constitutional confrontation" identified in that decision were not met here. *Green I* overruled an earlier decision by our state Supreme Court that had "held that prior statements of a witness that were not subject to cross-examination when originally made . . . could not be introduced under [section 1235] to prove the charges against a defendant without violating the defendant's right of confrontation" under the federal Constitution. (*Green I, supra,* 399 U.S. at pp. 150-151, overruling *People v. Johnson* (1968) 68 Cal.2d 646.) In doing so, *Green I* left open an issue involving some of the challenged statements. (*Green I,* at pp. 168-169.) Those statements bore on events the witness claimed at trial not to remember, and the United States Supreme Court determined that the issue "[w]hether [the witness's] apparent lapse of memory so affected [the defendant's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause" was "not ripe for decision," given that the state high court had not considered it and its resolution would "depend[] much upon the unique facts in this record." (*Id.* at pp. 168-170, fn. omitted.)

On remand, our state Supreme Court addressed the issue left open and held that the statements' admission did not violate the Sixth Amendment. (*People v. Green* (1971) 3 Cal.3d 981, 989-991 (*Green II*).) *Green II* structured its analysis around "the three-fold purpose of confrontation" as set forth in *Green I*: "(1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh [the witness's] demeanor." (*Green II,* at p. 989.) The Supreme Court concluded that all three purposes had been met, because the witness had affirmed under oath that the prior statement was his, defense counsel had the opportunity to cross-examine the witness but asked only one question about the inconsistency of the prior

statement, and the factfinder was able to observe the witness's demeanor on the stand, which was similar to his demeanor when making the prior inconsistent statements. (*Id.* at pp. 989-990.)

Young argues that the first purpose was not met here, because even though T.S. "appeared under prosecution subpoena and took the 'witness oath,' she refused to honor the oath when she declined to testify truthfully." As to this purpose, *Green I* explained that the focus is on whether "the jury can be confident that it has before it two conflicting statements by the same witness," which is accomplished "[i]f the witness admits the prior statement is his [or hers], or there is other evidence to show the statement is his [or hers]." (*Green I*, *supra*, 399 U.S. at p. 158.) Here, as the Attorney General points out, "although [T.S.] never acknowledged that she gave a statement to police, the jury was able to watch the video of the interview" and determine that she had done so.[8] This circumstance distinguishes this case from decisions on which Young relies in which there was actually room to doubt whether the witness had made the prior statements. (*Douglas v. Alabama* (1965) 380 U.S. 415, 419; *People v. Newton* (1970) 8 Cal.App.3d 359, 384-385.)

Young argues that nevertheless, the first purpose was not met because T.S. was not a "witness" under the Sixth Amendment due to her dishonesty on the stand. Young provides no authority for this assertion. To the contrary, our state Supreme Court has determined that the confrontation clause permits the admission of a witness's prior statements when "there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and *untruthful*." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220, italics added; see, e.g., *People v. Rodriguez* (2014) 58 Cal.4th 587, 632 (*Rodriguez*).) Young also complains that "the prosecution never attempted to seek a judicial order of contempt to compel [T.S.] to answer the questions

[8] For the same reason, the third purpose was also met, as the jury was able to watch T.S. while she made the prior statements and evaluate her demeanor then against her demeanor on the stand. Young does not argue otherwise.

put to her or to compel her to honor her oath," but we are not aware of any authority that would require such a procedure, and Young identifies none.

Nor did T.S.'s "deliberate and willful refusal to testify under the guise of memory lapse" deprive Young of a meaningful opportunity for cross-examination, as she claims. The confrontation clause does not mandate "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," and it "includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20-22 (per curiam).) In particular, "[t]he circumstance of feigned memory loss is not parallel to an entire refusal to testify. The witness feigning memory loss is in fact subject to cross-examination, providing a jury with the opportunity to see the demeanor and assess the credibility of the witness, which in turn gives it a basis for judging the prior hearsay statement's credibility." (*People v. Gunder* (2007) 151 Cal.App.4th 412, 420.) In any event, *Green I* observed that the lack of opportunity to cross-examine during the making of previous statements is not "of crucial significance" where, as here, the witness's current story is favorable to the defendant. (*Green I*, *supra*, 399 U.S. at p. 159.)

Finally, we are not persuaded by Young's claim that the admission of T.S.'s prior statements violated *Crawford*, an issue we will consider on the merits despite Young's failure to object on such grounds below. *Crawford* held that the confrontation clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify." (*Crawford, supra,* 541 U.S. at pp. 53-54.) The parties agree that T.S.'s statements were testimonial hearsay because they were made to the police in the course of a criminal investigation. (See *id.* at p. 53.) Young argues that T.S. effectively did not appear at trial even though she was available to do so, likening her to a witness who is available but not called by the prosecution.

Our state Supreme Court rejected a similar claim in *Rodriguez*. It explained that although *Crawford* and its progeny "changed constitutional confrontation law in a significant respect[,] . . . those cases made no change regarding use of prior statements of

a witness who actually testifies. *Crawford* itself 'reiterate[d] that, when the declarant appears for cross-examination at trial, the Confrontation Clause places *no constraints at all* on the use of his [or her] prior testimonial statements.' " (*Rodriguez*, *supra*, 58 Cal.4th at p. 632, italics added.) In *Rodriguez*, the witness at issue "provided some testimony, [but] she also claimed not to have any memory regarding the events she had told law enforcement agents about" during her out-of-court statements. (*Ibid.*) The Supreme Court determined that although the witness's "claim of total lack of recall limited [the] defendant's ability to cross-examine her about her prior statements[, . . .] this circumstance does not implicate the confrontation clause." (*Ibid.*) Young does not attempt to distinguish *Rodriguez*, and we conclude that the decision forecloses her *Crawford* claim. In conclusion, no constitutional error appears in the admission of T.S.'s out-of-court statements.

C. A Unanimity Instruction Was Not Required.

Young also claims that "an instruction on jury unanimity was required because there [was] evidence of two separate shootings." There was no error.

A criminal defendant has the right to trial by jury under the federal and state Constitutions (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16), and verdicts in California must be unanimous. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) CALCRIM No. 3500, the standard unanimity instruction, informs a jury that, where "[t]he People have presented evidence of more than one act to prove that the defendant committed [an] offense," it cannot find the defendant guilty "unless [the jurors] all agree that the People have proved that the defendant committed at least one of these acts and [they] all agree on which act." (CALCRIM No. 3500.) A trial court has a duty to give a unanimity instruction sua sponte if one is necessary (*People v. Riel* (2000) 22 Cal.4th 1153, 1199), and we review de novo Young's claim that one was required here. (See *People v. Moore* (2018) 19 Cal.App.5th 889, 893.)

"A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422.) Thus, a unanimity instruction is required when "the evidence establishes several acts, any one of

which could constitute the crime charged," and the prosecution has not elected to rely on a particular act. (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) One exception for cases involving a continuous course of conduct arises "when (1) 'the acts are so closely connected in time as to form part of one transaction,' (2) 'the defendant tenders the same defense or defenses to each act,' and (3) 'there is no reasonable basis for the jury to distinguish between them.' " (*People v. Lueth* (2012) 206 Cal.App.4th 189, 196, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 875.) "This exception ' "is meant to apply not to all crimes occurring during a single transaction but only to those 'where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject . . . testimony [about the particular incident] in toto.' " ' " (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1010-1011 (*Bui*); see *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791.)

According to Young, "[o]ne set of shots was fired when [she] chased after Smith" and "[t]he second set of shots was fired after Smith fell to the ground and there was some type of intervening conversation or argument between him and [her]." She concedes that she offered the same defense as to both sets of gunshots, but she claims that the two sets were "not so closely connected in time as to form part of one transaction." She also argues that the jury could have reasonably distinguished between the two sets, theorizing that "some jurors may have believed that the first set of shots was the cause of death . . . and that they were delivered without justification. Others may have believed the first set of shots was justified by self-defense, but that the subsequent shooting, which occurred after Smith was on the ground, [was] the cause of his death."

As the Attorney General points out, Division Four of this court rejected an "almost identical" argument in *Bui*. During a home invasion robbery, the defendant in that case pointed a gun at the victim, and the gun went off after the victim tried to push away the defendant's hand. (*Bui*, *supra*, 192 Cal.App.4th at p. 1006.) The victim fell to the ground and, within 10 seconds, "heard at least two more shots . . . in rapid succession." (*Ibid.*) The defendant argued that a unanimity instruction was required because the prosecutor did not elect which shots she relied on to support the charge of attempted

murder. (*Id.* at p. 1010.) Our colleagues disagreed, holding that "[t]he evidence showed that all of the gunshots were part of one continuous course of conduct." (*Id.* at p. 1011.) The court explained, "[The victim] testified the three shots he heard were fired within seconds of each other. There was no evidence from which the jury could conclude [the] defendant fired one shot but not the other[s]. [Citation.] On this record, the shots formed one transaction, and the jury must either have accepted or rejected [the victim's] testimony in toto." (*Ibid.*)

Young argues that here, in contrast, "there [was] evidence of two separate set[s] of gunshots" and "it is unknown when the *fatal* bullet or bullets were fired in the sequence of all the fired gunshots." Her attempt to distinguish *Bui* falls flat. There was no basis for concluding that she fired some of the shots but not others, and the lack of clarity about which gunshots killed Smith does not in and of itself bear on whether they were part of the same transaction. Moreover, there was no evidence on which the jury could have relied to conclude that the first set of shots but not the second caused Smith's death. If anything, the evidence suggested that Smith was not seriously wounded (and possibly not even hit) until the second series of shots. He was still standing and able to ask Young to stop before she fired those shots, and, given Young's height, the angle of his chest wounds suggested he was no longer standing when they were inflicted. No unanimity instruction was required.

D. The Trial Court Correctly Defined Implied Malice for the Jury.

Young next argues that the trial court erred by failing to instruct the jury "that implied malice murder require[s] a high probability of death" under *People v. Thomas* (1953) 41 Cal.2d 470, 480 (conc. opn. of Traynor, J.) (*Thomas*). We are not persuaded.

Malice, a required element of murder, "may be either express or implied. It is express 'when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' [Citation.] It is implied 'when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) Here, the jury was instructed under CALCRIM No. 520 that Young "acted with implied malice if she

intentionally committed an act; the natural and probable consequences of the act were dangerous to human life; at the time she acted, she knew her act was dangerous to human life; and she deliberately acted with conscious disregard for human life."

A trial court has a duty to give sua sponte "correct instructions on the basic principles of the law applicable to the case that are necessary to the jury's understanding of the case," including instructions "on all the elements of the charged offenses and enhancements." (*People v. Williams* (2009) 170 Cal.App.4th 587, 638-639.) We review de novo Young's claim that the challenged instruction incorrectly defined implied malice. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

Our state Supreme Court has "acknowledged two lines of decisions that attempt to delineate the objective and subjective components of implied malice. The first derives from Justice Traynor's concurring opinion in [*Thomas*], which said implied malice is shown when 'the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death.' [Citation.] The second line derives from *People v. Phillips* (1966) 64 Cal.2d 574 (*Phillips*) . . . , which described implied malice murder as a ' "killing [which] proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his [or her] conduct endangers the life of another and who acts with conscious disregard for life." ' " (*People v. Cravens* (2012) 53 Cal.4th 500, 512 (*Cravens*) (conc. opn. of Liu, J.).)

As Young acknowledges, the Supreme Court has concluded that the *Thomas* and *Phillips* formulations "actually articulate[] one and the same standard." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104 (*Nieto Benitez*).) In fact, "[c]oncerned . . . that juries might have difficulty understanding the *Thomas* test's concept of 'wanton disregard for human life,' " the Court has "emphasized that the 'better practice in the future is to charge juries solely in the straightforward language of the "conscious disregard for human life" definition of implied malice,' the definition articulated in the *Phillips* test." (*People v. Knoller* (2007) 41 Cal.4th 139, 152.) But in *Cravens*, Justice Liu observed that the Court had "never disavowed the *Thomas* formulation of implied malice,

particularly with respect to the objective component," and called for explicitly resolving the issue of "*Thomas*'s continued validity." (*Cravens, supra*, 53 Cal.4th at pp. 513-514 (conc. opn. of Liu, J.).)

Young argues that the Supreme Court's determination that the *Thomas* and *Phillips* standards are equivalent "does violence to the . . . ordinary definitions of words," because "there is a vast distinction between an act that has an 'ordinary consequence' of death and an act that has a 'high probability' of death." Relying on Justice Liu's concurring opinion in *Cravens*, Young argues that her case "is the case to finally resolve the question whether juries . . . are entitled [to] plain, clear, and unequivocal jury instructions that . . . implied malice requires an act that involves a high degree of probability that it will result in death."

Whatever the merits of Young's linguistic analysis may be, the Supreme Court has already rejected her claim that instruction under the *Thomas* standard is required. In *Nieto Benitez*, the defendant argued that CALJIC No. 8.31, which defines second degree murder, "misstates the law because the instruction omits a requirement that [a] defendant commit the act with a *high probability* that death will result," a standard higher than CALJIC No. 8.31's requirement that "[t]he natural consequences of the act [be] dangerous to human life." (*Nieto Benitez, supra*, 4 Cal.4th at p. 111; CALJIC No. 8.31.) The Supreme Court disagreed, concluding that the challenged instruction "correctly distills the applicable case law." (*Nieto Benitez*, at p. 111.) CALCRIM No. 520's formulation of the standard is substantively identical to that in CALJIC No. 8.31, and we conclude that *Nieto Benitez* forecloses Young's claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Young argues that stare decisis does not compel rejection of her claim, because no Supreme Court case has "expressly overruled" *Thomas* and "cases are not authority for propositions not considered." In taking this position, she fails to distinguish between the issue whether the *Thomas* standard is still valid and the issue whether a jury instruction that does not incorporate the *Thomas* standard is invalid. Even if the *Thomas* standard continues to be a correct statement of the law—an issue that *Nieto Benitez* did not

resolve—that does not compel the conclusion that a jury must be instructed on it—an issue that *Nieto Benitez* did resolve, against Young's position. The trial court did not err by not incorporating the *Thomas* standard into its instruction on implied malice.

E. The Omission of a Jury Instruction on Involuntary Manslaughter Was Harmless.

Young also contends that the trial court erred by inadvertently omitting a jury instruction on involuntary manslaughter that it had agreed to give. We conclude that the omission was not prejudicial, and this claim therefore fails.

1. Additional facts.

Before trial, Young requested that the jury be instructed on involuntary manslaughter under CALCRIM No. 580. The prosecution did not object, and the trial court indicated that verdict forms on that offense would be prepared. Shortly before jury selection began, Young withdrew her request, and the court stated it would "set aside the verdict forms for involuntary manslaughter."

After the close of evidence, Young's trial counsel indicated his belief that "some evidence" supported an instruction on involuntary manslaughter, although he did not intend to argue the issue. The court observed it had a duty to instruct on lesser included offenses supported by the evidence, and counsel agreed that "in an abundance of caution [CALCRIM No. 580] should be given." Despite this decision, the court did not read the jury an instruction on involuntary manslaughter, and neither party brought the omission to the court's attention.[9]

2. Discussion.

As we have said, murder is "an unlawful homicide . . . committed with the 'intention unlawfully to take aware the life of a fellow creature' (§ 188), or with awareness of the danger and a conscious disregard for life," i.e., with malice. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) Involuntary manslaughter, a lesser included offense of

[9] The record before us does not include either the written jury instructions or the unused verdict forms, but we will assume that the jury was not given the option of finding Young guilty of involuntary manslaughter.

murder, is a killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection" (§ 192, subd. (b)), i.e., without malice. (*Rios*, at p. 466.) Under California law, trial courts have a duty "to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.)

The Attorney General concedes that the trial court erred by not instructing on involuntary manslaughter, having found that sufficient evidence supported the instruction, and we will assume without deciding that the court should have given the instruction. We therefore turn to whether the error was prejudicial, which the parties agree is assessed under *People v. Watson* (1956) 46 Cal.2d 818, 836. Applying that standard, we ask whether it is reasonably probable that Young would have received a more favorable verdict had the jury been instructed on involuntary manslaughter. (See *ibid.*)

To begin with, " ' "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." ' " (*People v. Beames* (2007) 40 Cal.4th 907, 928.) Here, the jury was properly instructed on second degree murder under CALCRIM No. 520, including on the concepts of express and implied malice. Thus, by convicting Young of second degree murder, the jury necessarily found that she acted with malice, a finding that foreclosed a verdict of involuntary manslaughter. In arguing otherwise, Young claims that "[a] properly instructed jury could conclude from [her] statements and testimony that she did not act with the conscious disregard for life necessary for implied malice murder." But the question is what the jury *did* find, not what it *could* have found. Young fails to explain how the jury's finding that she killed with malice preserves the possibility that it would have found her guilty only of involuntary manslaughter had it been instructed on that crime.

Moreover, the defense's closing argument confirms the harmlessness of the instructional omission. Consistent with his indication to the trial court, Young's trial counsel did not argue for a conviction of involuntary manslaughter. Rather, he focused on the lack of premeditation and imperfect self-defense, concluding his argument by stating, "I believe you will find that [Young's] belief [in the need for self-defense] was honest and sincere. If you find that her actions were reasonable, then it's self-defense. If you find that her actions were unreasonable, then it's honest but unreasonable belief in self-defense, and then that is what we call voluntary manslaughter. And I submit to you that is what your verdict should be: Voluntary manslaughter." In light of the murder verdict and closing argument, we conclude there is no reasonable possibility that Young would have obtained a more favorable result had the court instructed the jury on involuntary manslaughter.

F. No Cumulative Error Appears.

Next, Young claims that the cumulative prejudicial effect of the errors she identifies above requires reversal of her murder conviction. The only potential error we have identified is in the omission of a jury instruction on involuntary manslaughter, which was harmless for the reasons given above. As a result, Young's claim of cumulative error fails. (See *People v. Fiore* (2014) 227 Cal.App.4th 1362, 1387.)

G. The Matter Is Remanded for the Trial Court to Exercise the Discretion Conferred by Senate Bill No. 620.

Finally, Young claims that the case must be remanded in light of Senate Bill No. 620 for the trial court to address whether to strike the three firearm enhancements. We accept the Attorney General's concession that a remand is appropriate.

At the time it sentenced Young in February 2017, the trial court had no discretion to strike the three firearm enhancements imposed under section 12022.53. (Former § 12022.53, subd. (h).) In October 2017, however, the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. The statute now provides that "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this

section." (§ 12022.53, subd. (h).) The discretion conferred by Senate Bill No. 620 "applies to any resentencing that may occur pursuant to any other law" (*ibid.*), and it is settled that the legislation applies retroactively to non-final judgments. (*People v. McVey* (2018) 24 Cal.App.5th 405, 418; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 (*McDaniels*); *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507-508.)

A remand for a trial court to exercise its discretion under Senate Bill No. 620 is required "unless the record shows that the . . . court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels*, *supra*, 22 Cal.App.5th at p. 425; accord *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) Here, the trial court did not so indicate. Indeed, the court noted, "The mandatory sentencing guidelines require the Court to impose certain sentences. The gun charge alone as an enhancement carries more than the taking of a life. . . . That is how intense it has become with the possession of weapons."

Therefore, we agree with the parties the matter must be remanded for the trial court to exercise its discretion under Senate Bill No. 620. On remand, the court shall determine whether to strike the firearm enhancement under section 12022.53, subdivision (d). Should the court choose to strike that enhancement, it shall then either lift the stay of the term for one of the lesser enhancements the jury found true—20 years for the personal and intentional discharge of a firearm under section 12022.53, subdivision (c), or 10 years for the personal use of a firearm under section 12022.53, subdivision (b)—or strike those enhancements as well. (See *McDaniels*, *supra*, 22 Cal.App.5th at p. 428.)

III.
DISPOSITION

The case is remanded for the trial court to consider whether to strike any of the three firearm enhancements imposed under Penal Code section 12022.53 and, if it does so, to resentence Young accordingly. The judgment is otherwise affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

_____

Kelly, J.*

*Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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